Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-279

VIRGINIA BAKER and
RUSSELL CARL BAKER,

Appellants,

v.

W. C. OWEN, Principal of Gibsonville School; JULIE A. LANGSTON, Teacher at Gibsonville School; and E. P. PEARCE, JR., Superintendent of Guilford County Public Schools; and RUFUS L. EDMISTEN, Attorney General of the State of North Carolina,

Appellees.

****

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

****

JURISDICTIONAL STATEMENT

****

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The appellants appeal from the judgment of the United States District Court for the Middle District of North Carolina, Greensboro Division, upholding the constitutionality of N.C.G.S. sec. 115-146.

OPINIONS BELOW

The opinion of the district court is not yet reported. It is set out in the Appendix, infra, pp. 18-41.

JURISDICTION

This action was brought to secure injunctive and declaratory relief against the enforcement of a North Carolina statute authorizing school personnel to inflict corporal punishment upon school children without parental consent, which plaintiffs claimed was in violation of their rights secured by the Constitution of the United States. Jurisdiction was based on 28 U.S.C. sec. 1343, 28 U.S.C. sec. 1331(a), and 42 U.S.C. sec. 1983.

The judgment of the United States District Court for the Middle District of North Carolina sought to be reviewed here was made and entered on June 13, 1975. Notice of appeal from this judgment was filed on July 3, 1975, in the United States District Court for the Middle District of North Carolina; a copy of the notice of appeal is set out in the appendix, infra, p. 46.

This Court has jurisdiction of the appeal by virtue of 28 U.S.C. sec. 1253. Cases believed to sustain the jurisdiction of the Court include Radio Corporation of America v. United States, 341 U.S. 412 (1950); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

N.C.G.S. sec. 115-146

> It shall be the duty of all teachers, including student teachers, substitute teachers, voluntary teachers, teachers' aids and assistants when given authority over some part of the school program by the principal or supervising teacher, to maintain good order, and discipline in their respective schools; ...

Principals, teachers, substitute teachers, voluntary teachers, teachers' aids and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and to maintain order. No county or city board of education or district committee shall promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

QUESTION PRESENTED

Does the constitutional concept of familial privacy bar school officials from whipping school children over parental objection?

STATEMENT OF THE CASE

Plaintiff Russell Carl Baker is a sixth grade public school pupil, and plaintiff Virginia Baker is his mother. Defendants are a teacher and principal of the pupil's school, the county superintendent of schools, and the Attorney General of North Carolina.

On December 6, 1973, the teacher, Julie Langston, administered corporal punishment to Russell Carl Baker. His mother, Virginia Baker, had requested the principal and teachers of the school on

several occasions not to punish her children corporally. As a matter of principle, she opposes corporal punishment by school teachers. (Virginia Baker deposition, pp. 8-11).

Following this occasion, Russell was kept out of school by his mother, the plaintiffs fearing that additional whippings would be administered if Russell went back to school. This action was filed at a time when the school authorities were in the process of commencing a criminal action against Virginia Baker for violation of the compulsory school attendance law, N.C.G.S. sec. 115-166, et seq. This threatened prosecution was commenced, was removed by plaintiffs to federal court, but was remanded to state court. (Middle District of North Carolina case No. C-74-90-G).

Russell is a frail child and not in good health. He was diagnosed as having rheumatic type complaints, headaches, nervousness, and emotional instability. (James R. Lent deposition, pp. 12-13; John A. Edwards deposition, p. 12).

During the mid-morning recess on December 6, 1973, Russell was on the school playground, when a schoolmate threw a ball at him and hit him in the head. Russell and his schoolmate were paddled. The paddling consisted of two hard licks with a wooden board, while Russell was bent over, holding his ankles. (Russell Carl Baker deposition, pp. 13-14). The teacher's explanation for the punishment was that it was against the rules to throw the

kick ball outside the school building. Russell had not received any instructions from the teacher or anyone else concerning throwing the kick ball and was not aware of any school rules on this subject. (Russell Carl Baker deposition, pp. 1-13).

Russell testified that he felt a stinging sensation when he was paddled. (Russell Carl Baker deposition, p. 14). His mother found two bruise marks three or four inches long at the lower end and below the spine, which stayed there for several days. (Virginia Baker deposition, p. 21). Mrs. Baker picked her son up at 11:00 A.M. on the day of the paddling. He had been sick with a stomach condition and by pre-arrangement was excused to leave for a doctor's appointment at that time. (Virginia Baker deposition, p. 21). After getting in the car, Russell told his mother that he was feeling sick, and when she pulled the car over, he started vomiting. He then began to cry and told his mother about the whipping. (Virginia Baker deposition, p. 21).

Plaintiffs' expert witness, John A. Edwards, a practicing clinical psychologist, testified that in his opinion the corporal punishment of Russell was detrimental to his psychological condition and that the perceived threat of additional whippings also was harmful. (John A. Edwards deposition, pp. 12-18). Plaintiffs' expert Dr. James R. Lent, a practicing chiropractor who had treated Russell several times over the years and had seen him since the whipping, expressed the opinion

that the corporal punishment had an adverse effect on his health. (James R. Lent deposition, pp. 17-19).

Before the district court, plaintiffs contended that it is unconstitutional for school authorities to whip children where parental consent has been withheld, that there are certain minimal procedural requirements that must be observed before corporal punishment can be administered in the school, and that the whipping in this particular case was arbitrary and was applied with excessive force. The district court, applying Goss v. Lopez, 43 U.S.L.W. 4181 (U.S. January 22, 1975), imposed certain procedural safeguards on the administration of corporal punishment in North Carolina's public schools, including that the pupil must be informed beforehand that specific misconduct could occasion corporal punishment, that this method should not be employed unless other sanctions had failed, that a second school officer must witness the punishment and be told of the reason for its application, and that upon request a written explanation for the punishment must be furnished to a parent.

However, the district court upheld the constitutionality of N.C.G.S. sec. 115-146, rejecting plaintiffs' claim that corporal punishment without parental approval is unconstitutional.

THE QUESTION IS SUBSTANTIAL

This Court has not considered the ap-

plication of constitutional guarantees to school children facing corporal punishment. The present case presents the question of whether it is constitutionally permissible for public school officials to punish corporally school children over the parents' objection. Plaintiffs believe that, on the record of the present case, by proper application of the concept of familial privacy developed by the Court, the issue should be resolved favorably to them and the judgment of the lower court reversed.

The statute, N.C.G.S. sec. 115-146, is authoritatively interpreted to authorize infliction of corporal punishment on school children contrary to the expressed desires of the parents. 3 R.E. Lee, North Carolina Family Law, sec. 249, p. 182 (1963).

The right of familial privacy, and specifically the right of parents to establish and carry out their own system of child rearing, is accorded protection under the Fourteenth Amendment. Holding that a state is without the right to compel the instruction of school children in the English language only, the Supreme Court in Meyer v. Nebraska, 262 U.S. 390,399 (1923), stated, "without a doubt, ...[liberty in the Fourteenth Amendment sense] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long

recognized at common law as essential to the orderly pursuit of happiness of free men." In the opinion of the Court, Justice McReynolds contrasted the system of Sparta in which male children at the age of seven were removed into barracks and were educated and trained by official guardians: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between the individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions on the people of a state without doing violence to both letter and spirit of the Constitution." 262 U.S. at 402.

In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court struck down a compulsory school attendance law, which required all children to be educated in schools maintained by the state and did not allow them to be taught in private schools. The Court held that this law "unreasonably interferes with liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. ... The child is not the mere creature of the state; those who nurture him and direct his destiny, have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534-35.

The foregoing cases were referred to as "decisions [which] have respected the private realm of family life which the state can not enter," in Prince v. Commonwealth of Massachusetts, 321 U.S. 158,166 (1944).

The district court concluded that rights of familial privacy are not fundamental rights, which can be outweighed only by a compelling state interest. Appendix infra, p. 29. This view is established to be erroneous by the decision in Stanley v. Illinois, 405 U.S. 645,651 (1972), where this right was for the first time declared as a preferred or fundamental constitutional right, the Court saying, "The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'". See also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

Because of the preferred position that the right of familial privacy occupies in our constitutional structure, the burden was upon defendants to establish a compelling state interest to override this inherent right. Stanley v. Illinois, supra; Griswold v. Connecticut, 381 U.S. 479 (1965). This the state failed to do.

The state's claim of a right to discipline school children is derived from the

supposition that the parent by sending his child to school has delegated disciplinary authority to the teacher. Cleary v. Booth, [1893] 1 Q.B. 465. In Drum v. Miller, 135 N.C. 204, 47 S.E. 421, 425 (1904), the Court said, "'The teacher for the time being stands to some extent at least, in loco parentis, and has such a portion of the powers of the parents delegated to him, namely, that of restraint and correction, as may be deemed necessary. . .'"

The assumption that the parent has delegated his disciplinary authority to the school teacher, did not place undue stress on the family relationship, as long as two conditions prevailed. First, public schools were voluntary and not compulsory. Second, corporal punishment was widely accepted as an appropriate means of disciplining and controlling every child.[1]

The legal underpinnings for whippings in the public schools must now be reexamined under the conditions of universal compulsory education, and in the light of modern attitudes and knowledge on child discipline.

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[1] This view is reflected in the quaint reasoning of North Carolina's text writer on the subject, Dr. Robert E. Lee, that the failure of a parent to whip the child at home "may very well be more of a reason for discipline and punishment for the particular child while at school." 3 R.E. Lee North Carolina Family Law, sec. 249, p. 182 (1963).

Formerly, the parent could withdraw the child from school without being compelled to pay for an expensive private education if he disagreed with the disciplinary policies of the school authorities. The parent, therefore, possessed an unlimited control over the chastisement of his child. In an era of univeral compulsory education, this option cannot exist for a family who is not well-to-do; only by allowing for parental approval and disapproval of corporal punishment in the schools, can the integrity of the family disciplinary scheme be maintained. The facts of the present case are illustrative. Russell Carl Baker was kept out of school following the whipping, out of a fear that he would be subjected to more whippings. The family was not able to afford private schooling. In due course Virginia Baker was prosecuted for violating the school attendance laws.

Not many years ago, it was widely believed that corporal punishment should be used for the discipline and control of all children. The "compelling state interest" asserted by defendants in this case, is the interest in maintaining order and discipline in the school and giving proper training to the pupils. State v. Mizner, 45 Iowa 248 (1876); Perkins, Criminal Law, p. 988 (2d ed. 1969). In today's public school systems, there are a variety of alternative disciplinary measures available, including warnings, reprimands, additional assignments of school work, physical work such as cleaning up classrooms, denial of privileges, temporary isolation (such as standing in the hall

or a room maintained for that purpose), suspension from school and finally expulsion from the school. Authorities in the behavioral sciences are virtually unanimous in the belief that this range of alternative disciplinary measures renders corporal punishment altogether unnecessary. Further, many experts in the behavioral fields believe that corporal punishment in the public schools is so psychologically damaging that it should be avoided altogether, even if it has some usefulness. (John A. Edwards deposition, pp. 16-17; articles collected in the appendix, infra, pp. 47-53). It is noteworthy that defendants offered no expert opinion to the contrary.

Long ago, the use of corporal punishment in the schools was only one of many forms in which physical punishment was lawfully administered by those in authority. None of these other uses are any longer permissible. In the past, sailors were commonly flogged by the masters of ships; today this is a crime on a United States vessel. 18 U.S.C. sec. 2191. Once a husband could beat his wife to control her; now that would constitute an assault. Puckett v. Puckett, 204 Ala. 607 (1941). Servants and slaves were physically punished by their masters; the status of the employee or servant today no longer justifies such measures, and they constitute assaults. Tinkle v. Dunivant, 84 Tenn. 503 (1866). More recently the courts have held that it is cruel and unusual punishment to corporally discipline a prison inmate. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). In support of this con-

clusion, the court in Jackson v. Bishop stated reasons which apply equal force to school children as to prison inmates: (1) No rules or regulation regarding the use of the strap can successfully prevent abuse. (2) Rules and regulations in this area are often unobserved and easily circumvented. (3) Corporal punishment is easily subject to abuse in the hands of the unscrupulous. (4) The grant of power to punish to persons in lower levels of the administrative authority is difficult to limit. (5) Corporal punishment generates hatred towards the system which permits it and is degrading to both the punisher and the punished.

Plaintiffs do not contend in this case that no corporal punishment may be used in the public schools. Where the parents and the school authorities are in agreement as to the method of chastisement for the child, the question of invasion of familial privacy does not arise, and the delegated authority of the parent and guardian to the school teacher protects the school authorities against any claim of cruel and unusual punishment, absent excessive force or arbitrary application of it. It is only when the parent opposes and seeks to prohibit corporal punishment of his child, that the constitutional issue is exposed.

It is important to note that the whipping of the child against his parent's will carries the potential of more serious psychological damage to the child, than is present where a child is physically disciplined with parental consent. As plaintiffs' expert witness, clinical psychologist John

Edwards testified:

> "I think that in any situation where the adults who have primary responsibility for the care of a youngster strongly disagree, you're going to have a situation which causes the children to become highly anxious and to be somewhat unsure of the position that they may be in; so in the situation where the school and the parents are disagreeing, the child is really very much caught in a bind. I think the situation offers him an opportunity to certainly get into all kinds of problems - - not only with his feelings, but in terms of his behaviors - - trying to find out, really, who has primary responsibility for him so he knows where the limits are." (John A. Edwards deposition, p. 14).

Defendants offered no rebuttal to this expert opinion.

Long before the development of the constitutional doctrine of familial privacy, state courts in applying the common law recognized that the school teacher could not use the whip to control the child in ways contrary to the dictates of his parents. In Morrow v. Wood, 35 Wis. 59, 64, 17 Am. R. 471 (1874), it was held that a school teacher could not corporally punish a child for refusing to pursue a course of study for-

bidden by the parent. The court stated:

> We do not think she had any such right or authority and we can see no necessity for clothing the teacher with any such arbitrary power. . . Ordinarily, it will be conceded, the law gives the parent the exclusive right to govern and control the conduct of his minor children, and he has the right to enforce obedience to his commands by moderate and reasonable chastisement. And furthermore, it is one of the earliest and most sacred duties taught the child, to honor and obey its parents. The situation of the child is truly lamentable, if the condition of the law is that he is liable to be punished by the parent for disobeying his orders in regard to his studies, and the teacher may lawfully chastise him for not disobeying the parent in that particular.

Accord, State v. Mizner, 50 Iowa 145, 32 Am. R. 128.

These sound common law decisions were made in an era when no constitutional questions were raised to the unchallenged right of school authorities to impose physical discipline on pupils for the purpose of maintaining order in the school. The deference to parental authority exhibited by these decisions, applied in a modern setting when nearly unanimous scientific objection has been raised against the practice, require a determination that corporal punishment should not be administered in the school against parental will.

The decision of the court below is in conflict with another district court decision, Glaser v. Marietta, 351 F.Supp. 555 (W.D.Pa. 1972), where public school officers were enjoined from administering corporal punishment upon children whose parents had sent notice prohibiting this disciplinary method. This Court should entertain the present appeal on its merits, and should resolve the conflict between the district courts, by reversing the decision of the court below.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-74-46-G

VIRGINIA BAKER and
RUSSELL CARL BAKER,

Plaintiffs,

versus

W. C. OWEN, Principal of Gibsonville School; JULIE A. LANGSTON, Teacher at Gibsonville School; and E. P. PEARCE, JR., Superintendent of Guilford County Public Schools; and RUFUS L. EDMISTEN, Attorney General of the State of North Carolina,

Defendants.

THREE-JUDGE COURT

(Heard January 13, 1975, Decided April 23, 1975)

Before CRAVEN, Circuit Judge, GORDON, Chief District Judge, and WARD, District Judge.

Norman B. Smith (Smith, Carrington, Patterson, Follin & Curtis, Greensboro, North Carolina) for Plaintiffs; Welch Jordan and William Caffrey (Jordan, Wright, Nichols, Caffrey & Hill, Greensboro, North Carolina) for Defendants Owen and Langston; John W. Hardy and Frank W. Bullock, Jr. (Douglas, Ravenel, Hardy & Crihfield, Greensboro, North Carolina) for Defendant Pearce; and Rufus L. Edmisten, Attorney General of North Carolina, Andrew A. Vanore, Jr., Deputy Attorney General, and Raymond L. Yasser, Associate Attorney General, Raleigh, North Carolina, for Defendant Edmisten.

CRAVEN, Circuit Judge:

This three-judge court was convened to consider the claims of Russell Carl Baker and his mother that their constitutional rights were violated when Russell Carl Baker was corporally punished by his teacher over his mother's objections and without procedural due process. Russell Carl, a sixth-grader, was paddled on December 6, 1973, for allegedly violating his teacher's announced rule against throwing kickballs except during designated play periods. Mrs. Baker had previously requested of Russell Carl's principal and certain teachers that Russell Carl not be corporally punished, because she opposed it on principle. Never-

theless, shortly after his alleged misconduct her son received two licks in the presence of a second teacher and in view of other students.

Mrs. Baker alleges that the administration of corporal punishment after her objections violated her parental right to determine disciplinary methods for her child. Russell Carl charges that the circumstances in which the punishment was administered violated his right to procedural due process, and that the punishment itself in this instance amounted to cruel and unusual punishment. This special court was convened because both Mrs. Baker in her claim and Russell Carl in his procedural due process claim have challenged the constitutionality of North Carolina General Statutes § 115-146. They claim that this statute, which empowers school officials to "use reasonable force in the exercise of lawful authority to restrain or correct pupils and to maintain order,"[1] is unconstitutional insofar as it allows corporal punishment over parental objection and absent adequate procedural safeguards.

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[1] N.C. Gen. Stat. § 115-146 reads as follows:

> Duties of teachers generally; principals and teachers may use reasonable force in exercising lawful authority.--It shall be the duty of all teachers, including student teachers, substitute teachers, voluntary teachers, teachers' aides and assistants

We hold that fourteenth amendment liberty embraces the right of parents generally to control means of discipline of their children, but that the state has a countervailing interest in the maintenance of order in the schools, in this case sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes. We also hold that teachers and school officials must accord to students' minimal procedural due process in the course of inflicting such punishment. We further hold that the spanking of Russell Carl in this case did not amount to cruel and unusual punishment.

I.

Defendants contend that this court was improperly convened because plaintiffs do not mount a substantial attack on the constitutionality of the statute. Defendants argue, first, that

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[1] (continued)

> when given authority over some part of the school program by the principal or supervising teacher, to maintain good order and discipline in their respective schools; to encourage temperance, morality, industry, and neatness; to promote the health of all pupils, especially of children in the first three

1. (Continued)

grades, by providing frequent periods of recreation, to supervise the play activities during recess, and to encourage wholesome exercises for all children; to teach as thoroughly as they are able all branches which they are required to teach; to provide for singing in the school, and so far as possible to give instruction in the public school music; and to enter actively into the plans of the superintendent for the professional growth of the teachers. Teachers shall cooperate with the principal in ascertaining the cause of nonattendance of pupils that he may report all violators of the compulsory attendance law to the attendance officer in accordance with rules promulgated by the State Board of Education.

Principals, teachers, substitute teachers, voluntary teachers, teachers' aides and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No county or city board of education or district committee shall promulgate or continue in effect

plaintiffs' claims present no substantial constitutional question; and second, that even if authorities need parental consent and certain procedures before punishing students corporally, section 115-146 would stand unscathed because it could be reinterpreted as requiring parental consent and procedural safeguards for force to be "reasonable" and authority to be "lawful".

It is true that a three-judge court is not required when a constitutional attack upon a state statute is insubstantial. Ex Parte Poresky, 290 U.S. 30 (1933); see Gonzales v. Automatic Employees Credit Union, 43 U.S.L.W. 4025, 4027 n.14 (U.S. Dec. 10, 1974). Goosby v. Osser, 409 U.S. 512 (1973), states the insubstantiality standard:

> "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," . . . "wholly insubstantial," . . . "obviously frivolous," . . . and "obviously without merit," . . . . The limiting words "wholly" and "obviously" have cogent legal significance. . . . A claim is insubstantial only if "'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the

1. (Continued)

a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

inference that the questions sought to be raised can be the subject of controversy.'"

409 U.S. at 518 (citations omitted). Plaintiffs claims in this suit are certainly not "wholly insubstantial" or "obviously frivolous." No Supreme Court decision forecloses them--quite the contrary, it is upon several such decisions that plaintiffs base their attack against the North Carolina practice. Moreover, lower federal courts that have considered claims similar to plaintiffs' have not found their disposition self-evident, see, e.g., Glaser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972), nor do we. We therefore reject defendants' first argument.

Defendants' second argument is elusive. They would have us see the questioned statute as infinitely malleable, its phrases "reasonable force" and "lawful authority" capable of connoting whatever constitutional restrictions a court might impose on the inflication of corporal punishment. Viewed this way, the statute appears beyond constitutional reproach: a decision that parental consent or certain procedures are pre-requisites to corporal punishment would simply pour new meaning into the statutory adjectives "reasonable" and "lawful." Thus, they argue, plaintiffs' real contention is that the defendant school officials have used unreasonable force and exercised unlawful authority in inflicting physical punishment over parental consent and without adequate procedural safeguards.

In their statutory context, however, the

words "reasonable" and Lawful" do not seem intended to perform the function assigned them by defendants. Defendants would liken them to the Due Process and Equal Protection Clauses of the Constitution, whose words embody an ever greater number of concepts as courts constantly revise their ideas of what process is "due" and what application of the laws "equal." But the statute's words are, of course, not in a constitution. Instead, they seem to us to embody no more than the traditional tort concepts that a person privileged to use force can use only the force necessary under the circumstances, i.e., pursuant to his lawful authority. Viewed this way, the statute can be paraphrased to say that school officials in North Carolina are empowered by the legislature to use whatever force necessary under the circumstances for the limited purposes of correcting their pupils and maintaining order.

With the statute so construed, it is clearly subject to the attack made by plaintiffs. Indeed, defendants argue in their briefs and oral argument that school officials can corporally punish pupils over parental objections and without antecedent procedural safeguards. They have alluded to the statute as authority for their position, and have cited us to state court cases and an eminent North Carolina treatise as evidence that state policy under this statute has long given school officials such power. Thus there is no disputing that the statute allows the practices that plaintiffs challenge, or that school officials acting pursuant to their authority under the statute

engage in those practices.

Thus this case differs from Phillips v. United States, 312 U.S. 246 (1941), relied upon by defendants. There the United States had sought an injunction from a single district judge against a state governor who had declared martial law in an effort to block construction of a federal project. The governor claimed that only a three-judge court could hear the suit for injunction, because he claimed justification for his actions in state constitutional provisions making him Commander-in-Chief of the militia and statutes granting him broad police powers. Noting that "[i]n its complaint the United States did not impugn the validity of these [state] provisions," the Supreme Court held a three-judge court unnecessary because "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." 312 U.S. at 252.

In this case, unlike Phillips, plaintiffs directly attack the constitutionality of a state statute, and the statute, again unlike Phillips, has always been read to authorize the conduct of which they complain. Cf. Query v. United States, 316 U.S. 486 (1942). Plaintiffs seek "to interpose the Constitution against enforcement of a state policy," which is precisely the situation that the Court in Phillips said requires a three-judge court. 312 U.S. at 251. In this respect this case is like the recent

Supreme Court case of Goss v. Lopez, 43 U.S. L.W. 4181 (U.S. Jan. 22, 1975). In Goss a three-judge court was required to hear a challenge to a state statute that gave school authorities the power to suspend pupils. The basis of the challenge was that the statute allowed suspensions without procedural safeguards, and that the policy of officials acting under the statute was to suspend without such safeguards. See 43 U.S. L.W. at 4182, 4187. Here the assertion is that the North Carolina statute allows corporal punishment without parental consent and adequate procedures, and that officials acting pursuant to the state regularly punish corporally without such consent or procedures. We see no difference between this case and Goss, and therefore reject defendants' second argument against jurisdiction.

II.

The Supreme Court first acknowledged the constitutional stature of parental rights over half a century ago in Meyer v. Nebraska, 262 U.S. 390 (1923). There the Court, speaking of the right "to marry, establish a home and bring up children" as components of the liberty protected by the fourteenth amendment, 262 U.S. at 399, struck down a state law forbidding certain foreign language instruction in part because it arbitrarily interfered with the "the right of parents" to procure such instruction for their children, id. at 400. Two years later the Court in Pierce v. Society of Sisters, 268 U.S. 510 (1925), struck down another state statute requiring public school attendance because it "unreasonably interfere[d]

with the liberty of parents and guardians to direct the upbringing and education of children under their control," id. at 534-35.

The Meyer and Pierce decisions have since been interpreted by the Court as recognizing that, under our constitutional scheme, "the custody, care and nurture of the child reside first in the parents." Prince v. Massachusetts, 321 U.S. 158, 166 (1944); see Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972). Mrs. Baker urges that the right to determine disciplinary methods for Russell Carl is part of her primary right to and responsibility for his "custody, care and nurture"; that as such it is a fundamental right; and that the state therefore must show a compelling interest in order to punish Russell Carl corporally against her wishes.

We agree with Mrs. Baker that the fourteenth amendment concept of liberty embraces the right of a parent to determine and choose between means of discipline of children, but few constitutional rights are absolute. Our inquiry does not end with the conclusion that Mrs. Baker has such a right but we must go on to consider the nature and extent of the state's interest in school discipline. Sometimes the rights of citizens that find protection within the Constitution are overborne by a countervailing and greater state interest. We think that is the situation here--whether the test to be applied is that of a compelling state interest or simply of a rational and legitimate interest in maintaining order and discipline in the

public schools. We embark upon the traditional analysis, aware that to apply the compelling interest test merely encapsulates the result and that "no state law has ever satisfied this seemingly insurmountable standard." Dunn v. Blumstein, 405 U.S. 330, 363-64 (Burger, C.J., dissenting).

We reject Mrs. Baker's suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read Meyer and Pierce to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end legitimately within its power. See 268 U.S. at 535-36; 262 U.S. at 400, 403. Nor has the Court subsequently spoken of parental rights as fundamental; on the contrary, its references to them lend support to the view that they are not. See Yoder, supra, at 233; Prince, supra, at 166-67. Nor, contrary to Mrs. Baker's contention, do emanations from such cases as Griswold v. Connecticut, 381 U.S. 479 (1965), or Stanley v. Illinois, 405 U.S. 645 (1972), combine with the Court's direct discussions of parental control over child-rearing to raise the parental right to a status as fundamental. But see Glaser, supra, at 559-60 (1972).

Of course, the Court's failure, to date, to refer to parental rights as fundamental

does not preclude our recognizing them as such. The Court's statement in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), that the status of a particular right as fundamental depends upon whether it is "explicitly or implicitly guaranteed by the Constitution," coupled with the Court's finding in Meyer and Pierce that parental rights are "implicit" in the concept of liberty in the fourteenth amendment, would provide a reasoned basis for determining that parental rights are today to be deemed fundamental. Cf. Skinner v. Oklahoma, 316 U.S. 535 (1942). Mrs. Baker's power to decide whether corporal punishment is to be used with Russell Carl, as one of her parental rights, could then in perfect syllogistic logic be accorded the highest degree of constitutional protection.

We refuse to travel this path, for although perfectly marked out by logic it seems to us insufficiently directed by reason and common sense. A finding that Mrs. Baker's power of decision regarding corporal punishment is fundamental would require the state to show both a compelling interest and the unavailability of alternative means of fulfilling that interest before it could contravene her decision. See e.g., Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972). A sensitive consideration of the nature of Mrs. Baker's right to preclude corporal punishment, and the context in which she seeks to assert it, simply forecloses the imposition of such a burden upon the state.

Insight into the nature of Mrs. Baker's

right, for the purpose of deciding whether it should receive ultimate protection, can best be gained by comparing it to the parental rights at stake in Meyer, Pierce, and Prince. The Court in Meyer spoke of "the natural duty of the parent to give his children education," and the "supreme importance" which Americans had always attached to the acquisition of knowledge, 262 U.S. at 400; it was this natural duty and this traditionally vital concern that the parents there were interested in furthering. In Pierce the Court was faced with a claim invoking "the right of parents to choose schools where their children will receive appropriate mental and religious training," 268 U.S. at 532, and it remarked how the availability of schools meeting such a need had "long [been] regarded as useful and meritorious," id. at 534. And in Prince the parental right was the inculcation of one's religious beliefs in one's children, which unquestionably partakes of the "preferred position in our basic scheme" that is accorded the exercise of one's religion. See 321 U.S. at 164.

The common characteristic of the parental interests in all three cases is their venerability. In each instance the Court started with a premise that could provoke no quarrel--that the specific parental concern implicated was worthy of great deference due to its unquestioned acceptance throughout our history. Mrs. Baker's opposition to corporal punishment, on the other hand, enjoys no such universal approbation in our society even today, and certainly not historically. Quite the contrary, it bucks a settled tra-

dition of countenancing such punishment when reasonable. See generally F. Harper & F. James, The Law of Torts § 3.20 (1956); 68 Am. Jur. 2d, Schools § 258 (1973). And though we accept Mrs. Baker's assertion that corporal punishment of children is today discouraged by the weight of professional opinion, we are also cognizant that the issue is unsettled and probably incapable of categorical resolution. See Glaser, supra, at 557; Sims v. Board of Educ., 329 F.Supp. 678, 685 (D. N. Mex. 1971); Ware v. Estes, 328 F. Supp. 657, 659 (N.D. Tex. 1971). We simply cannot foresee a parent's absolute disapproval of reasonable corporal punishment soon achieving the kind of societal respect that is clearly accorded the desire to expose one's child to certain fields of knowledge, to send him to a private or parochial school, or to pass on one's religious heritage to him. Thus, regardless whether the specific parental interests involved in Meyer, Pierce, and Prince should be considered fundamental, and without disparaging one whit Mrs. Baker's right to decide the methods of punishment to be employed with Russell Carl by herself or other private parties, we cannot say that her right of total opposition to his corporal punishment is fundamental in a constitutional sense.

We believe, therefore, that defendants can justify their corporal punishment of Russell Carl by showing that it furthered a legitimate state end. Accord, Gonyaw v. Gray, 361 F. Supp. 366, 369 (D. Ver. 1973). The statute under challenge authorizes such punishment only "to restrain or correct pupils

and to maintain order." Since Mrs. Baker has not charged, and we find no evidence to suggest, that Russell Carl's punishment was for any other purpose, we must decide whether the statutory purposes are legitimate and sufficient to overcome Mrs. Baker's desires.

There can be no doubt about the state's legitimate and substantial interest in maintaining order and discipline in the public schools. Education may not be a fundamental interest, see Rodriguez, supra, at 29-40, but the people of our states have long recognized its vital importance and provided it to their young people at public expense. See, e.g., Yoder, supra, at 205. It should be clear beyond peradventure, indeed self-evident, that to fulfill its assumed duty of providing an education to all who want it a state must maintain order within its schools, as the Supreme Court has recognized on several occasions. See, e.g., Goss v. Lopez, supra, 43 U.S.L.W. at 4185; Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969).

There are many, of course, including Mrs. Baker and the experts upon whose testimony and writings she relies, who believe that school officials can and should maintain order without using corporal punishment. We are aware that their view is shared by many professional educators, parents and others. But as we noted above, opinion on the merits of the rod is far from unanimous. On such a controversial issue, where we would be acting more from personal

preference than from constitutional command, we cannot allow the wishes of a parent to restrict school officials' discretion in deciding the methods to be used in accomplishing the not just legitimate, but essential purpose of maintaining discipline. Cf. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). So long as the force used is reasonable--and that is all that the statute here allows--school officials are free to employ corporal punishment for disciplinary purposes until in the exercise of their own professional judgment, or in response to concerted pressure from opposing parents, they decide that its harm outweighs its utility.

III.

Entirely different considerations come into play with Russell Carl's claim that the statute allows corporal punishment without due process. The initial inquiry must be whether Russell Carl has a liberty or property interest, greater than de minimis, in freedom from corporal punishment such that the fourteenth amendment requires some procedural safeguards against its arbitrary imposition. Only if such an interest is found must we proceed to an inquiry as to the type of procedure to be employed. See generally Goss v. Lopez, supra, 43 U.S.L.W. at 4184; Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

We believe that Russell Carl does have

an interest, protected by the concept of liberty in the fourteenth amendment, in avoiding corporal punishment. This conclusion is compelled by a conflux of many premises and postulates. Premier among them is the expansive nature of fourteenth amendment liberty, which the Supreme Court has often emphasized. See, e.g., Roth, supra, at 572. We believe that the concept must include, in appropriate instances, personal security in the seemingly small things of life as well as in the obviously momentous. Cf. Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970). Secondly, the legal system, once quite tolerant of physical punishment in many contexts, has become less so. See generally Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (prohibiting use of the strap on prisoners); 18 U.S.C. § 2191 (1970) (outlawing flogging of sailors on United States ships); 1 F. Harper & F. James, The Law of Torts § 3.20, at 289 (1956) (discussing husband's loss of the privilege of corporally disciplining his wife, and an employer's similar loss of privilege as to domestic employees). Indeed, it is questionable at best whether the law would now privilege any degree of corporal punishment of an adult. While the state historically has been granted broader powers over children than over adults, see, e.g., Prince, supra, at 167-70, the Supreme Court has explicitly recognized that children have rights, too. Goss v. Lopez, supra, 43 U.S.L.W. at 4184; Tinker, supra, at 506, 511. Thus, although the weight of legal authority still permits corporal punishment of public school children, see Restatement (Second) of Torts § 153(2) (1965), it seems uncontrovertible

that the child has a legitimate interest in avoiding unnecessary or arbitrary infliction of a punishment that probably would be completely disallowed as to an adult. Moreover, North Carolina has itself given school children reasonable expectation of freedom from excessive or pointless corporal punishment by writing into secion 115-146 the requirements that such punishment be reasonable and used for specific purposes only. Cf. Goss v. Lopez, supra, 43 U.S.L.W. at 4183-84; Roth, supra, at 577-78. Yet it has failed to provide any procedural protection to insure that those acting under the statutory authority will adhere to its dictates and neither punish arbitrarily nor use unreasonable force.

Having concluded, upon due consideration of all the above factors, that North Carolina school children have a liberty interest, we must decide what procedural safeguards should protect it. We are guided here by the principle, recently reaffirmed by the Supreme Court in a similar context, "that the interpretation and application of the Due Process Clause are intensely practical matters and that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" Goss v. Lopez, supra, 43 U.S. L.W. at 4185, quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

Our task is to fashion procedures that accommodate as best as possible the child's interest with the state's unquestioned interest in effective discipline. There is no dispute about the state's assertion that ela-

borate, time-consuming procedures antecedent to infliction of corporal punishment would destroy its value, as the essence of corporal punishment is swift and tangible wages for one's transgression. Glaser, supra, at 558-59; Sims, supra, at 683. Plaintiffs concede, as we believe they must, that this basic consideration precludes our requiring the full panoply of procedural due process rights, i.e., such things as formal notice, right to counsel, right of confrontation and cross-examination.

Instead, plaintiffs request only those minimal procedures necessary to protect the student's interest without undercutting the disciplinary value of the punishment. We believe such procedures are few in number, but that is not to downplay their importance. First, except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means--keeping after school, assigning extra work, or some other punishment--will insure that the child has clear notice that certain behavior subjects him to physical punishment. Second, a teacher or principal must punish corporally in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of

the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; the requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment. And finally, an official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.

IV.

Plaintiffs do not assert that corporal punishment per se violates the eighth amendment prohibition of cruel and unusual punishment. See Ingram v. Wright, 498 F.2d 248, 259-60 (5th Cir. 1974), and cases cited. Their claim instead is that the paddling administered to Russell Carl on December 6, 1973, was so harsh and excessive, considering the circumstances,

as to amount to cruel and unusual punishment.[2]

It is an unsettled issue whether the eighth amendment prohibition applies at all to the corporal punishment of school children. Compare, e.g., Gonyaw, supra, at 368 (stating that it does not), with Ingraham, supra, at 59 n.20 (stating that it does). Even if we assume, without full consideration of the question, that it does apply, we find as a fact that the punishment received by Russell Carl did not approach the level of cruel and unusual.

His teacher, a female, administered two licks to his buttocks with a wooden drawer

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[2] The claim that Russell Carl's punishment was so excessive as to violate the eighth amendment does not implicate N.C.G.S. § 115-164, but instead challenges only a particular instance of punishment. This claim is appropriate for a single judge. Nevertheless we decide it rather than referring it to a single judge because we necessarily became familiar with the contentions and the evidence while considering the challenges to the statute. To send it to a single judge would therefore waste rather than conserve judicial resources. See Allee v. Medrano, 416 U.S. 802, 812 & n.8 (1974).

divider a little longer and thicker than a foot-ruler. Russell Carl himself testified that he felt only a stinging sensation, and claimed no lasting discomfort or disability from the paddling. Nor does it appear that he had to leave school early because of it. Doctors did testify that Russell Carl is an abnormally frail and sensitive child to whom such a paddling could be more emotionally or psychologically damaging than to the normal child, but we find that the teacher who administered the paddling and other school officials were unaware of his condition. Mrs. Baker testified that she found two bruise marks which remained for several days, but she did not characterize them as severe and there was no evidence of hematoma. In short, this record does not begin to present a picture of punishment comparable to that in Ingraham, supra, at 255-59, or in Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable.

V.

By way of summary, we hold that North Carolina General Statutes § 115-146 is constitutional on its face. But we also hold that to implement the statute without according to students procedural due process would be a violation of the fourteenth amendment. We have suggested minimal procedures that would satisfy the fourteenth amendment. Nothing contained herein, however, is intended to prevent or dissuade the state from

further elaboration upon necessary requirements in order to accomplish fairness in administration.

We hold on the facts of the case that the punishment of Russell Carl Baker was not cruel and unusual within the meaning of the eighth amendment.

We request that counsel for plaintiffs prepare and submit to counsel for defendants an appropriate judgment to be submitted thereafter to the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

VIRGINIA BAKER and RUSSELL CARL BAKER, Plaintiffs v. W. C. OWEN, Principal of Gibsonville School; JULIE A. LANGSTON, Teacher at Gibsonville School; and E. P. PEARCE, JR., Superintendent of Guilford County Public Schools; and RUFUS L. EDMISTEN, Attorney General of the State of North Carolina, Defendants	:	C-74-46-G JUDGMENT

The opinion of this three-judge court was filed on April 23, 1975. Counsel for the plaintiffs was requested to prepare, to circulate to opposing counsel, and to submit an appropriate judgment. Thereafter, on May 29, 1975, plaintiffs' motion for modification of judgment from court's opinion was filed, together with a proposed judgment. No response nor objection was filed by coun-

sel for the defendants. Subsequently, the members of this court conferred, and pages fourteen (14) and fifteen (15) of its opinion were sua sponte amended as appears of record and as attached to an order entered contemporaneously herewith.

Now, therefore, consistent with the amended opinion it is ORDERED, ADJUDGED, AND DECREED that:

1. North Carolina General Statute § 115-146, on its face, is declared not to be in violation of the Constitution of the United States.

2. Defendants, their agents and servants, and their successors, are permanently enjoined in the administration of corporal punishment in the public schools of the State of North Carolina to conform to the minimal due process requirements of the Fourteenth Amendment as follows:

> (a) Except for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punish-

ment and an attempt to modify behavior by some other means--keeping after school, assigning extra work, or some other punishment--will insure that the child has clear notice that certain behavior subjects him to physical punishment.

(b) A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.

(c) An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.

The above minimal due process requirements are not intended to prevent or dissuade the state from further elaboration upon necessary requirements in order to accomplish

fairness in administration.

3. The parties shall bear their own costs.

FOR THE COURT:

/s/ Hiram H. Ward
United States District Judge

June 13, 1975

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-74-46-G

VIRGINIA BAKER, et al., Plaintiffs,	)	
v.	)	NOTICE OF APPEAL
W.C. OWEN, etc., et al., Defendants.	)	

Plaintiffs give notice of appeal to the Supreme Court of the United States from the judgment of the Court entered in this action on June 13, 1975. This appeal is taken pursuant to 28 U.S.C. §1253.

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